IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1192

GINSBURG, FELDMAN & BRESS,
Petitioner,

v.

FEDERAL ENERGY ADMINISTRATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 29, 1979

THE CASILLAS PRESS, INC.—1717 K Street N. W.—Washington, D. C.—223-1230

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Ginsburg, Feldman & Bress, a Washington, D.C., law partnership, respectfully petitions this Court to issue a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

There are four court rulings in this case which are reproduced in the Appendix (hereafter "App."):

(1) The June 18, 1976, judgment and memorandum opinion of the United States District Court for the District of Columbia which essentially rejected petitioner's Freedom of Information Act request. App. 11a.

(2) The February 14, 1978, judgment and opinion by a panel of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court by a 2-1 vote. App. 20a.

(3) The February 14, 1978, order by that Court of Appeals, sitting *en banc*, which *sua sponte* vacated the panel's judgment and opinion and set the matter down for *en banc* rehearing. App. 99a.

(4) The October 31, 1978, judgment of the Court of Appeals affirming the District Court by an equally divided court. App. 100a.

None of these rulings is reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether written guidelines used by Federal Energy Administration auditors in auditing refineries under FEA's regulatory jurisdiction must be produced to petitioner pursuant to the Freedom of Information Act, 5 U.S.C. §552, or whether the guidelines are exempt from production under FOIA sections 552(b)(2), 552(b)(5), 552(b)(7)(E) or 552(a)(2)(C), or for any other reason.

STATUTES AND REGULATIONS

The text of the Freedom of Information Act, as amended, 5 U.S.C. §552, is set forth at App. 1a.

STATEMENT OF THE CASE

This Freedom of Information Act (FOIA) suit seeks production of the Federal Energy Administration's "Refinery Audit Review Field Audit Guidelines", as supplemented on February 28, 1975, and March 21, 1975, by FEA's "Guidelines for Audit Modules" (hereafter collectively referred to as the "Guidelines"). The Guidelines instruct FEA auditors on methods and procedures for auditing petroleum refiners under FEA's regulatory jurisdiction.[1]

The events leading to this suit began on January 24, 1975, when plaintiff, a Washington, D.C., law firm representing various clients before FEA, filed a FOIA request subsequently interpreted to cover the materials at issue. The request was first denied on March 12, 1975, by FEA's Information Access Officer on the ground that the materials were "investigatory records compiled for law enforcement purposes [which] would disclose investigative techniques and procedures". App. 110a. *See* 5 U.S.C. §552(b)(7)(E).

On appeal, FEA's Deputy Administrator affirmed the denial, but for a different reason. In a May 13, 1975, "Decision and Order of Federal Energy Administration", the Deputy Administrator ruled that the Guidelines do not constitute an "administrative staff manual" which must be released under 5 U.S.C. §552(a)(2)(C), but rather are "law enforcement material whose release would enable a violator

[1] When this case was brought, FEA was the United States government agency charged with the administration of federal statutes and regulations relating to refining of petroleum products, including the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, as amended by the Energy Policy and Conservation Act, Pub. L. No. 94-163 (1975), and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212. The Department of Energy is now responsible for FEA's former auditing responsibilities. For simplicity we continue to refer to it as the FEA in this petition.

to violate the law and escape detection."[2] App. 108a. Thus, according to the Decision and Order, "the materials in question are exempt from disclosure under the judicially recognized exemption to Section 552(a)(2)(C)." App. 108a. The Decision and Order did not rely on any specific exemption found in 5 U.S.C. §552(b).

Its administrative remedies exhausted, petitioner filed suit on January 7, 1976. On June 18, 1976, after cross-motions for summary judgment, the United States District Court for the District of Columbia entered a judgment which protected the bulk of the documents in question. The court, however, did not rely on either theory previously advanced by FEA officials to deny production.[3] Instead, it held that the Guidelines were largely exempt under

[2]Petitioner certainly does not seek the Guidelines to enable its clients to violate the law. Rather, it requests the document to allow its clients to know, understand and correctly apply FEA regulations and to resist audit activity inconsistent with FEA instructions. FEA regulations have been repeatedly criticized by Congressional spokesmen and others as insufficient, inordinately complex and ambiguous. FEA has also been charged with "discriminatory enforcement" and "a lack of *fairness* to firms in the regulated industry". *See, e.g.*, Report of the Senate Subcommittee on Administrative Practices and Procedures of the Committee on the Judiciary, "The Federal Energy Administration: Enforcement of Petroleum Price Regulations", 1975, pp. 2, 17, 21, 38; *Standard Oil Co. v. DOE*, CCH Energy Management, 1974-1978 Court Decisions ¶26,092 at 26,790-91 (N.D. Ohio, Jan. 23, 1978). *See also* Judge Wilkey's dissent to the February 14, 1978, *Ginsburg* decision (discussed *infra*) where he states that "these Guidelines [are] designed, as plaintiff contends, to prevent FEA auditors from exceeding their instructions and authority, and from unduly harassing the business enterprises inspected". App. 93a. Judge Wilkey also observed that the Guidelines "prevent dangerous freelancing and extemporizing by agents [and] give them common directives within recognized legal limits." App. 94a. In any event, FOIA does not require that an applicant demonstrate why it wants the records it seeks.

[3]The court specifically rejected (b)(7)(E) as a ground for nondisclosure, App. 15a, and appeared to reject any rationale for withholding based on (a)(2)(C). App. 14a.

5 U.S.C. §552(b)(2) which protects materials "related solely to the internal personnel rules and practices of an agency." App. 17a.

On February 14, 1978, a panel of the Court of Appeals for the District of Columbia Circuit affirmed by a 2-1 vote. The majority (MacKinnon, J. and Robb, J.) ruled that, since the Guidelines related to "law enforcement matters" and are not an "administrative staff manual" within the meaning of section (a)(2)(C), they could be withheld even if no specific exemption applied. App. 23a-30a, 50a. The majority also found the documents exempt from production under section (b)(2) because they "related solely to the internal personnel rules and practices of an agency." App. 33a-50a. Finally — although the issue had not been raised by the parties — the panel concluded that the documents were protected by section (b)(5) which shields "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." App. 54a-58a. Judge Wilkey filed a detailed dissent. App. 66a.

Within a matter of hours after the panel's decision, the Court of Appeals, *en banc, sua sponte*, vacated the panel's judgment and opinion, invited additional briefing, and set the matter down for *en banc* rehearing. App. 99a. On October 31, 1978, the court (eight judges sitting) affirmed the lower court without opinion, stating only that "[t]he judgment of the District Court is affirmed by an equally divided court." App. 100a.

The same day, however, the full court also decided *Jordan v. Department of Justice*, No. 77-1240 (D.C. Cir. Oct. 31, 1975) which had been argued *en banc* with the *Ginsburg* case. By a 7-2 vote, the court ordered release of two manuals relating in part to law enforcement procedures maintained by the United States Attorney for the District of Columbia. Judge Wilkey's opinion for the *Jordan* majority adopted the basic positions he had urged in his February

14, 1978, dissent to the now-vacated panel decision in the *Ginsburg* case. The dissent in *Jordan* filed by Judges MacKinnon and Robb is in many respects similar to their February 14, 1978, majority opinion in *Ginsburg*.

REASONS FOR GRANTING THE PETITION

This petition should be granted, first, because the case raises important, unresolved issues of federal law — some expressly left open by this Court — which should be decided by it; second, because the Court of Appeals' decision conflicts with decisions from other circuits and with decisions it has itself rendered (including one decided the same day) and may well conflict with decisions of this Court. We recognize that intra-circuit conflicts are normally not a basis for a writ of certiorari.[4] Such conflicts are significant here, however, because they focus attention on the confusion that troubles an important area of federal law and the unfairness to petitioner inflicted by the *Ginsburg* decision.[5]

I. The Case Raises Important Issues Of Federal Law.

FOIA is a significant, heavily used federal statute. Since its enactment, federal departments and agencies have been inundated by requests for "agency records". Although many of these requests have ended in federal litigation[6], a variety of issues remain in dispute and unresolved by this Court.

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[4] *Davis v. United States*, 417 U.S. 333, 340 (1974).

[5] *E.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zietz*, 333 U.S. 56, 59-61 (1948); *John Hancock Mut. Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939).

[6] *Freedom of Information Case List*, August 1978 Edition, published by the Office of Legal Counsel, U.S. Department of Justice, lists 592 reported cases decided under the Act.

On the surface, the workings of the Act appear simple. Three FOIA provisions require production of records to the public. Section (a)(1) states that certain records — *e.g.*, "rules of procedure" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency" — must be published in the Federal Register. Section (a)(2) requires an agency to index and make available certain other records — *e.g.*, agency "final opinions" and "administrative staff manuals and instructions to staff that affect a member of the public". Section (a)(3), a catch-all section, mandates production of all other agency records which are reasonably described and sought in accordance with agency rules. These disclosure requirements are subject to the nine exemptions in section (b); no records must be released if any exemption applies. The nine exemptions notwithstanding, "disclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The basic questions presented by this petition are whether an investigatory manual such as the Guidelines must be produced under FOIA and, if not, what specific provision or provisions of the Act justify nondisclosure. The extraordinary history of the *Ginsburg* case clearly demonstrates that judges in the District of Columbia Circuit are badly divided on these issues.

Numerous other lower federal court decisions have also wrestled with the problem whether government manuals and investigatory guides must be produced under FOIA. These cases include: *Caplan v. Bureau of Alcohol, Tobacco and Firearms*, No. 78-6077 (2d Cir. Oct. 31, 1978) ("Raids and Searches" manual); *Jordan v. Department of Justice*, No. 77-1240 (D.C. Cir. Oct. 31, 1978) (prosecutors' manuals); *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978) (DEA "Agents Manual"); *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C.), *rev'd on other grounds sub nom. Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied sub nom. Rosen v. Vaughn*, 415 U.S. 977 (1974)

(DOD contract audit manual); *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972), *aff'd sub nom. Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973) (OSHA manual for compliance safety and health officers); *Hawkes v. IRS*, 467 F.2d 187 (6th Cir. 1972) (IRS Manual); *Polymers, Inc. v. NLRB*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1001 (1970) (NLRB election guide); *Cox v. Department of Justice*, No. 77-2220 (D.D.C. Sept. 22, 1978), *appeal docketed*, No. 78-2267 (D.C. Cir. Dec. 14, 1978) (U.S. Marshals Manual); *Sladek v. Bensinger*, No. C-76-1678-A (N.D.Ga. Sept. 2, 1977), *appeal docketed*, No. 77-3247 (5th Cir. Nov. 10, 1977) (DEA manual); *Cox v. Levi*, No. 76 CV 604-W-4 (W.D.Mo. Feb. 14, 1977 and Aug. 31, 1977), *appeal docketed*, No. 77-1213 (8th Cir. March 10, 1977) (FBI Manuals); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972) (IRS manual); *Tietze v. Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972) (HEW social security "supplementary claims guidelines"); *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971) (Bureau of Customs law enforcement training manuals); *see also Stern v. Richardson*, 367 F. Supp. 1316 (D.D.C. 1973) (FBI "Cointelpro" documents); *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (*dicta*).

As discussed in the next section, the rulings in these cases cannot be reconciled. The immediate point, however, is that the question whether any FOIA provision allows withholding manuals and investigatory guides is one which has commanded, and continues to command, significant attention from the federal judiciary. Moreover, requests for a variety of other government manuals not yet the subject of litigation would undoubtedly embroil the government, applicants and the federal courts in extensive controversy.

In part uncertainty exists because this Court has expressly left the issue open, at least as to whether investigatory manuals are exempt under 5 U.S.C. §552(b)(2) — the provision which protects materials "related solely to the internal personnel rules and practices of an agency."

In *Department of the Air Force v. Rose* this Court ruled that section (b)(2) did not protect edited case summaries of Air Force Academy honor and ethics hearings. Referring to the striking differences between the Senate Report as to (b)(2)[7] (which would protect only trivial "housekeeping" matters) and the related House Report[8] (which would protect investigatory manuals) this Court said:

> Almost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose. Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting agency withholding of matters of some public interest, have done so only where necessary to prevent circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function . . . Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report . . . We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards. Release of the [sanitized] summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes of the Academy." 425 U.S. at 363-64.

This Court concluded:

> In sum, we think that, at least where the situation is not one where disclosure may risk cir-

[7] S. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 8.

[8] H. Rep. No. 1497, 89th Cong., 2d Sess. (1966), p. 10.

> cumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest. *Id.* at 369.

Commenting on this Court's statements in *Rose*, the Court of Appeals for the District of Columbia Circuit in the recent *Jordan* case observed: "[T]his language of the Supreme Court means no more than that the Court cautiously left open the question of what to do about any exemption 'where disclosure may risk circumvention of agency regulation.'" Slip op. at 38. As long as this question is "open," confusion as to whether such materials must be produced — confusion best exemplified by the labored history of the *Ginsburg* case — will continue to plague the federal courts, the federal departments and agencies, and applicants under the Act.

II. The Case Presents Intercircuit Conflicts And Possible Conflicts With Opinions Of This Court.

Because the *en banc* Court of Appeals filed no opinion in this case, we are uncertain what grounds for non-disclosure were relied upon by the four judges who voted for affirmance.[9] The government argued that four different FOIA provisions justify withholding the Guidelines: (b)(2) (the internal personnel rules and practices provision); (b)(5) (the internal memoranda provision); (b)(7)(E) (the investigatory records provision); and (a)(2)(C) (the administrative manual provision). If the court's affirmance was based on any of these provisions, significant conflicts exist with another circuit or circuits — indeed, with other District of Columbia Circuit decisions. Moreover, if the decision rests on (b)(5) or (a)(2)(C), it conflicts with decisions of this Court. But the precise basis for the decision may be less important than the fact that this case will enable this Court to resolve numerous conflicts and finally determine

[9]Whether all four judges relied on the *same* ground or grounds is also not clear.

the important question whether investigatory manuals must be released under the Act.

The discussion that follows highlights the conflicts presented by this case. It also demonstrates that, whatever the basis for the *Ginsburg* decision, that case was wrongly decided.

1. **Exemption (b)(2).** The District Court held that the Guidelines are "related solely to the internal personnel rules and practices of an agency" and thus protected by (b)(2). Because the *en banc* Court of Appeals affirmed the District Court's judgment, it is reasonable to speculate that that court also relied on (b)(2), as did the majority in the now-vacated February 14, 1978, panel opinion.

If it did, its holding is consistent with the Second Circuit's decision in *Caplan v. Bureau of Alcohol, Tobacco and Firearms*, No. 78-6077 (2d Cir. Oct. 31, 1978), which was issued the same day as *Ginsburg* and held that (b)(2) protected a Bureau manual entitled "Raids and Searches". In *Caplan* the Second Circuit stated:

> We believe, in sum, that the interpretation of (b)(2) by the Supreme Court in *Rose*, not only does not preclude but furnishes support for holding that this exemption prevents the forced disclosure of the information in the BATF manual which is here sought. It would be anomalous indeed to attribute to Congress the intention to require agency revelation of internal law enforcement manuals. Slip. op. at 157.

But such a holding would be (as is the *Caplan* holding) flatly contrary to decisions in the Fifth, Sixth, and Eighth Circuits. It would, moreover, conflict with other decisions by the District of Columbia Circuit. These cases follow the Senate Report concerning (b)(2) which would exempt internal matters of concern only to an agency's employees, rather than the broader House Report which would protect investigatory manuals.

In *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972), the Sixth Circuit, concerning an Internal Revenue Service manual, stated:

> [W]e believe that the internal practices and policies referred to in (b)(2) relate only to the employee-employer type concerns upon which the Senate Report focused. With such view of the subsection in mind it is apparent that the type of material one would expect to find in the Manual sought by Appellant is unlikely to be exempted from disclosure by (b)(2). *Id* at 796.

Similarly, in *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973), the Fifth Circuit held that (b)(2) did not safeguard an OSHA manual, declaring:

> We conclude that this statutory exclusion must not be read so broadly as to exempt the manual sought here. Although this manual does include some amount of material which falls within the description of personnel rules and practices, the manual is not solely or even primarily composed of that type of material. *Id*. at 703.

Recently, in *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978), which dealt with a Drug Enforcement Administration "Agents Manual", the Eighth Circuit said:

> The Supreme Court in *Department of the Air Force v. Rose* . . . recognized [the Senate] definition as an accurate reflection of Congressional intent. Thus, (b)(2) exempts only "housekeeping" matters in which "the public could not reasonably be expected to have an interest." *Id*. at 1309-10.

Moreover, in *Jordan v. Department of Justice* — also decided the same day as *Ginsburg* — the District of Columbia Circuit ruled that (b)(2) did not cover the United States Attorney's "Papering and Screening Manual for the Superior Court" and "Pre-Trial Diversion Guidelines".

Relying on its prior decision in *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) and this Court's opinion in *Department of the Air Force v. Rose*,[10] the court (correctly in our view) stated:

> [A]s our analysis of the statutory language of Exemption 2 and its legislative history demonstrates, Exemption 2 was not designed to protect documents whose disclosure might risk circumvention of agency regulation, whatever would be the merits of such a provision. Exemption 2 is much more limited, as we have described. Slip. op. at 38.[11]

2. **Exemption (b)(5).** This section allows withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In the now-vacated February 14, 1978, *Ginsburg* opinion, the panel's majority ruled that the Guidelines are exempted by this provision which protects decisional advice memoranda used in the deliberative process. Section (b)(5) may thus be a basis for the October 31 affirmance.

The panel in *Ginsburg* held exemption 5 apposite because:

> [T]he instructions to auditors and investigators for their preparation of . . . factual data to be used in determining law enforcement in all cases should . . . be exempt on the . . . theory . . . that

[10]This Court relied heavily on Judge Wilkey's opinion in *Vaughn* in *Department of the Air Force v. Rose*. *See* 425 U.S. at 365-67.

[11]The decisions of the District of Columbia Circuit in *Jordan* and *Ginsburg* appear totally irreconcilable whatever the basis for the latter opinion, as the discussion throughout this petition demonstrates. The *Jordan* case ordered release of law enforcement materials. *See also Sladek v. Bensinger*, No. C-76-1678-A (N.D.Ga. Sept. 2, 1977), *appeal docketed*, No. 77-3247 (5th Cir. Nov. 10, 1977). Other cases which have withheld such materials (*e.g.*, *Caplan v. Bureau of Alcohol, Tobacco and Firearms; Cox v. Department of Justice*) frequently present conflicts in their application of FOIA provisions.

> the data is collected prior to the agency reaching a decision as to the compliance of the investigated party with the law . . . Exemption 5 . . . definitely does include executive memoranda which constitute instructions to investigators for discovering facts as to whether regulated parties are complying with the law that the agency is charged to enforce. App. 56a-57a.

The panel found some support for this proposition in *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1006 (2d Cir. 1969) (indicating that the NLRB's "A Guide to the Conduct of Elections" could be withheld) and in *City of Concord v. Ambrose*, 333 F. Supp. 958, 960-61 (N.D. Cal. 1971) (Bureau of Customs documents used to train law enforcement agents protected).

Such a holding, however, would conflict with decisions by this Court, the Fifth Circuit, and even the District of Columbia Circuit.

Most importantly, a decision in *Ginsburg* resting on (b)(5) would be at odds with decisions of this Court which indicate that this provision was intended to protect "predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision . . ." *Renegotiation Board v. Grumman Aircraft*, 421 U.S. 168, 184 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-55 (1975). These cases demonstrate that a document (such as the Guidelines) which is the *result* of decisionmaking processes, and which contains formulated agency policy and instructions to employees based on that policy, is *not* covered by the exemption. *See also EPA v. Mink*, 410 U.S. 73, 85-89 (1973).

Moreover, the Fifth Circuit has rejected (b)(5) as a ground for withholding a government manual. In *Stokes v. Brennan*, that court ordered release of an OSHA "Training Course for Compliance Safety and Health Officers".

Declining to apply (b)(5), the court said:

> [W]e think it would be a perversion of the Act to classify the materials sought in this case as within this provision which is designed to encourage the free exchange of ideas among government policymakers. . . The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes. 476 F.2d at 703-04.

See also International Paper Co. v. Federal Power Commission, 438 F.2d 1349, 1358-59 (2d Cir. 1968).

Also relevant is the recent *Jordan* case where the District of Columbia Circuit said:

> The Manual and FOT Guidelines . . . represent the promulgation and implementation of policies that have *already been adopted.* Since the Manual and FOT Guidelines undeniably govern all of the office's work, they constitute its "effective policy" and thus are neither "predecisional" nor "deliberative." Slip. op. at 45 (emphasis in original).

Accord: Merrill v. Federal Open Market Committee, 565 F.2d 778, 783-84 (D.C. Cir. 1977); *Vaughn v. Rosen*, 523 F.2d at 1143-47; *Stern v. Richardson*, 367 F. Supp. 1316, 1320 (D.D.C. 1973).

3. **Exemption (b)(7)(E).** The government has contended that this provision — which protects "investigatory records compiled for law enforcement purposes [which] would . . . disclose investigative techniques and procedures" — is applicable here. If the affirmance rested on this ground, it conflicts with other circuit court decisions, both without and within the District of Columbia Circuit, which hold that an "investigatory record" is a record *compiled during the course of a specific investigation.* These cases indicate

that a document generally used to conduct a variety of investigations is *not* such a record.

A clear expression of these principles is found in the Eighth Circuit's opinion in *Cox v. Department of Justice*, which involved a DEA Agents Manual. The Eighth Circuit said:

> Exemption (b)(7) applies only to investigatory records that are compiled in the course of a specific investigation. The mere fact that the staff manual of a law enforcement agency deals with investigative techniques and procedures does not place that manual within the scope of (b)(7). * * * We conclude that the (b)(7) exemption does not apply to the DEA Manual, for the manual contains no information compiled in the course of an investigation. 576 F.2d at 1310.

Of the same thrust are *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 218-19 (3d Cir. 1977);[12] *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974); and *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also* Judge Leventhal's concurrence in *Jordan v. Department of Justice*, slip op. at 6; the District Court opinion in *Ginsburg*, App. 11a, and the District Court opinion in *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 445 F. Supp. 699, 702-03 (S.D. N.Y. 1978), *aff'd on another ground*, No. 78-6097 (2d Cir. Oct. 31, 1978); and *Sladek v. Bensinger*, slip op at 1.

[12] In *Committee on Masonic Homes*, the Third Circuit said (556 F.2d at 219):

> [T]he NLRB argues that it *has* an enforcement purpose, for which the [union authorization] cards were "compiled" — the purpose of enforcing the National Labor Relations Act (NLRA). We do not find this enough. If it were, any records compiled by the NLRB would fit the initial requirement of

4. **Section (a)(2)(C).** This provision declares that an agency must make available and index "administrative staff manuals and instructions to staff that affect a member of the public." Section (a)(2) is one of three FOIA sections which compel disclosure of records (assuming that no section (b) exemption applies). *See*, p. 7, *supra*.

Section (a)(2)(C) is *not* an exemption, yet the majority's February 14, 1978, opinion declared that since the Guidelines constitute "law enforcement material" rather than an "administrative staff manual", they are exempt from production even if no specific section (b) exemption applies. This result, the panel concluded, is mandated by the provision's legislative history which indicates that "law enforcement material" is totally exempt under its dictates. Other circuits have reached similar conclusions. *Stokes v. Brennan* (5th Cir.); *Hawkes v. IRS* (6th Cir.). Most recently the Eighth Circuit in *Cox v. Department of Justice* said:

> If (a)(2)(C) applies to the [DEA agents] manual but does not require disclosure, does (a)(3) nevertheless require disclosure? We think not. We

section 7. We think "law enforcement purposes" must relate to some type of formal proceeding, and one that is pending.[6] The 1965 Senate Report says clearly of exemption 7 investigatory files compiled for law enforcement purposes: "These are the files prepared by Government agencies to prosecute law violators."[7] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[6] The NLRB argues that the cards may well be used in some future unfair labor practice proceeding. That is not enough. If it were, nearly all NLRB records could fit this definition.

[7] The House Report adds: "This would include files prepared in connection with related Government litigation and adjudicative proceedings." H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

agree with the conclusion of Professor Davis, who has analyzed this problem and believes that the specific legislative intent behind (a)(2) controls the more general intent behind (a)(3):

> Even if none of the nine exemptions applies, some "records" may be free from required disclosure under (a)(3) because of the legislative intent behind (a)(2). [K. Davis, *Administrative Law Treatise* 56 (Supp. 1976).]
> 576 F.2d at 1306.

See also City of Concord v. Ambrose.

The October 31 affirmance may thus rest on (a)(2)(C) grounds. If it does, this decision — and the holdings similar to it — conflict not only with the express language of FOIA, but also with a variety of cases decided by this Court, other circuits, and the District of Columbia Circuit.

FOIA section (c) states: "This section does not authorize withholding of information or limit the availability of records to the public *except as specifically stated in this section.*"(Emphasis added). The Senate Report concerning this provision confirms that *no* records are exempt under the Act unless a section (b) exemption is available.[13]

In light of the language of the statute and the legislative history, it is not surprising that this Court has repeatedly emphasized that the Act's exemptions are "exclusive". *E.g., Department of the Air Force v. Rose,* 425 U.S. at 360-61 (1976); *NLRB v. Sears, Roebuck & Co.,* 421 U.S. at 136; *EPA v. Mink,* 410 U.S. at 79. As this Court said in *NLRB v. Sears, Roebuck & Co.:*

> As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. *421 U.S. at 136.*

[13] *See* S. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 10. *See further* FOIA section (a)(4)(B) and the last sentence of section (b).

There are similar holdings in several circuits. *E.g., General Dynamics Corp. v. Marshall,* 572 F.2d 1211, 1215 (8th Cir. 1978);[14] *Charlotte Mecklenburg Hospital Authority v. Perry,* 571 F.2d 195, 200 n.15 (4th Cir. 1978); *Columbia Packing Co. v. USDA,* 563 F.2d 495, 500 n.3 (1st Cir. 1977); *Robles v. EPA,* 484 F.2d 843 (4th Cir. 1973). In *Robles* the Fourth Circuit said:

> On this appeal, the defendant agency apparently concedes that it is obligated to disclose to the plaintiffs, without regard to their interest or want of interest, the information requested unless disclosure is "specifically" excused under one of the nine express exemptions set forth in the Freedom of Information Act, and that, in asserting an excuse for disclosure under any express exemption, "the burden is on" it "to sustain its action." Whether conceded or not, this is the clear purport of the Act itself. *Id.* at 845.

Decisions by the District of Columbia Circuit are also in accord with this Court's holdings. *E.g., Jordan v. Department of Justice; Montrose Chemical Corp. v. Train,* 491 F.2d 63, 66 (D.C. Cir. 1974); *Soucie v. David,* 448 F.2d 1067, 1076-77 (D.C. Cir. 1971).

The *Jordan* case specifically rejects the proposition that (a)(2)(C) provides an independent basis for exemption.

> If particular records, such as the Manual and Guidelines in this case, do not fall within the scope of (a)(2), it does not mean that such documents are not disclosable under the Act; it means only that they are not subject to the particular indexing and public inspection and copying requirements of that paragraph; these same documents may nevertheless be covered by either (a)(1) or (a)(3). Indeed, (a)(3) is a catch-all

[14] *But see Cox v. Department of Justice.*

provision, and virtually every agency record which does not fall within (a)(1) or (a)(2) is disclosable under (a)(3) unless it falls within one of the nine exemptions in subsection (b). Slip. op. at 13-14.

* * *

The three paragraphs in subsection (a) of the Act *are not exempting provisions. The only exemptions in the Act are to be found in subsection (b).* The nine specific exemptions set forth in that subsection are exclusive. As the Act is structured, then, an agency is not justified in withholding records from public disclosure unless those records fall within the specific terms of at least one of the nine exemptions in subsection (b). *Id.* at 15 (emphasis in original).

* * *

It is thus plain that limitations in paragraph (a)(2) with respect to law enforcement manuals, do not "exempt" materials from disclosure under paragraph (a)(3), since the only exemptions in the Act, as Congress has expressly declared, are in subsection (b). *Id.* at 17.[15]

[15]The government also contended to the Court of Appeals in *Ginsburg* that the court had equitable discretion to withhold the Guidelines if it determined that production would not be in the public interest. At least one circuit has adopted a similar position. *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974); *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969). *See also Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). Other circuits, however, have expressly rejected this proposition, thus presenting a conflict in this regard as well. *See, e.g., Fruehauf v. IRS*, 522 F.2d 284, 291-92 (6th Cir. 1975), *vacated on other grounds*, 429 U.S. 1085 (1977); *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Wellford v. Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971); *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971). The Second Circuit appears uncertain on this issue. *E.g., Rose v. Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976).

CONCLUSION

This case involves important, unresolved issues regarding the workings of a federal statute in constant use and frequently the subject of federal litigation. We doubt that this Court has often been asked to review a case which presents such a disparate array of significant conflicts among courts of appeals and with decisions of this Court. The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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